87-614

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. -

RONALD W. SAPPENFIELD,
FANTASY ONE, INC., and
FANTASY TWO, INC., *Petitioners*,

v.

STATE OF INDIANA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

Richard Kammen
McCLURE, McCLURE & KAMMEN
235 N. Delaware Street
Indianapolis, Indiana 46204
(317) 632-6341
Counsel for Petitioner

Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTIONS PRESENTED FOR REVIEW

I

Is Indiana's criminal RICO statute (IC 35-45-6-2 et seq., the Indiana Corrupt Business Influence Act) violative of the First and Fourteenth Amendments to the Constitution of the United States to the extent that it allows prosecution for criminal RICO on the basis of two or more allegations of obscenity violations where those violations are not reduced to convictions?

II

Are the First Amendment procedural safeguards of *Heller v. New York*, 413 U.S. 483 (1973) violated by a state law which allows the arrest and prosecution of an individual for criminal RICO based upon predicate allegations, not reduced to conviction, of obscenity violations without allowing, post-arrest, a prompt adversary determination of the probable obscenity of items upon which the prosecution is based?

III.

Is the Indiana criminal RICO statute, unconstitutionally vague in violation of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States?

LIST OF PARTIES

All parties appear in the caption of this case in this Court.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, FIRST DISTRICT

OPINION BELOW

The decision of the Indiana Court of Appeals, First District, published at 505 N.E.2nd 504 (1987) appears in the Appendix hereto. (Appendix A) A timely petition for rehearing was filed and denied without opinion. (Appendix B) A timely petition for transfer was filed with the Supreme Court of Indiana and was denied without opinion. (Appendix C)

JURISDICTION

The decision of the Indiana Court of Appeals was entered on March 31, 1987. A timely petition for rehearing was filed and denied on May 15, 1987. A petition for discretionary transfer

was timely filed with the Indiana Supreme Court and denied on August 17, 1987. This petition was filed within sixty days of that date as required by 28 U.S.C. §2101(d) and Rule 20 (1) of this Court. The Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part that: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PROVISIONS OF INDIANA CODE INVOLVED

The pertinent provisions of the Indiana Code are presented in Appendix D. The sections included are: I.C. 35-45-6-1 and I.C. 35-45-6-2, I.C. 35-49-2-4 and I.C. 34-4-30.5-1 et seq.

STATEMENT OF THE CASE

As a result of an investigation into alleged obscenity violation in Howard County, Indiana, law enforcement officers purchased several magazines at stores operated under the names of the corporate defendants and allegedly controlled by the defendant, Ronald Sappenfield. The magazines are sexually explicit. Sappenfield and the corporate defendants were charged with distribution of obscene matter, Class "A" misdemeanors under I.C. 35-49-3-1.

Without obtaining convictions on the misdemeanor charges, the prosecuting attorney alleged a pattern of criminal activity arising from the distribution of the *same material* pursuant to the Indiana Corrupt Business Influence Statute (RICO) Indiana Code 35-45-6-2 et seq. These charges are Class "C" felony charges.

The petitioners moved to dismiss the RICO charges. Petitioners alleged that the RICO statute was unconstitutional in that it was unlawfully vague, denied procedural due process in the context of obscenity, and had an impermissible chilling effect upon the exercise of first amendment rights. Petitioners specifically alleged violations of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. (Appendix E) On September 18, 1985, the trial court found that the RICO statute could not be constitutionally applied to violations of Indiana's obscenity statute. (Appendix F)

The State appealed that decision to the Indiana Court of Appeals which reversed the trial court based upon the Indiana Supreme Court's decision in *Goldsmith, et al, v. 4447 Corporation, et al*, 504 N.E.2d 559 (1987). Petitioner timely filed a petition for rehearing with the Court of Appeals of Indiana which was denied. Thereafter, a timely petition for discretionary transfer was filed with the Indiana Supreme Court which was denied on August 17, 1987.

A Petition for Writ of Certiorari in the *Goldsmith* case has been filed with this Court *sub nom Fort Wayne Books, Inc. v. State of Indiana*. The decision of the Indiana Supreme Court in *Goldsmith* is set out in full in Appendix G.

REASONS THE WRIT SHOULD BE GRANTED

I.

THE INDIANA COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT, TO-WIT: THAT IT IS CONSTITUTIONALLY PERMISSIBLE TO PROSECUTE AN INDIVIDUAL FOR CRIMINAL RICO VIOLATIONS BASED UPON MERE ALLEGATIONS THAT HE HAS, ON TWO PRIOR OCCASIONS, DISTRIBUTED OBSCENE MATTER.

This case comes before this Court in an era of unprecedented reliance upon the guarantees of the First Amendment. Large numbers of books are published daily. Movie production, television, and radio flourish.

On a local level, a whole new industry, home video, has developed within the past 7 years. Video stores, many "Mom & Pop" operations, abound. Many communities, some reluctantly, tolerate the existence of "Adult" bookstores.

In Indiana, most video stores and adult bookstores, some drugstores and book shops, the owners, employees, suppliers, and landlords alike, are threatened with being labeled "racketeers." Some, like the Petitioner, are threatened with conviction, imprisonment and the forfeiture of their possessions. Law abiding citizens who sell sexually explicit material are now having to decide whether or not to continue business and risk prosecution or modify what they offer for sale in order to accommodate local prosecutors who, without benefit of a jury's determination of "contemporary community standards" can impose the pre- and post-trial sanctions of RICO.

Printed and pictorial matter is presumptively protected. Because of that presumption, one has the freedom to probe the outer limits of that which the community will tolerate. *Heller v. New York*, 413 U.S. 483 (1973); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Jenkins v. Georgia*, 418 U.S. 153 (1974). The First Amendment allows the individual to challenge the thinking and the feelings of the community. *Memoirs v. Massachusetts*, *supra*.

Petitioners contend that since they have not been convicted of any obscenity related offenses, they cannot be constitu-

tionally charged with racketeering activities using obscenity as a predicate. To permit such a prosecution will have a substantial and impermissible chilling effect upon the exercise of the first amendment rights of all persons in the State of Indiana. If one, who on two occasions four or five years apart, sells a particular film which, in the eyes of a prosecutor, may subject him to a charge of racketeering, then clearly the seller will have no alternative but to totally eliminate from his inventory any matter which might arguably subject him to prosecution. Since a seller will be forced to limit his inventory to that which is the most unobjectionable to *all* adults, the net result will be to reduce that which is available to adults to material only suitable for children. *Butler v. Michigan*, 352 U.S. 380 (1957). The result will be a substantial and impermissible chilling effect upon the exercise of constitutional liberties throughout Indiana and, indeed, the Nation.

Availability of the Racketeering Statute and its severe sanctions will cause most purveyors of communicative material, to decline to explore the envelope as to what a community will tolerate. Rather, they will adopt a more conservative approach. While this may be satisfactory to those who are uncomfortable with the degree of sexually explicit material commonly tolerated, it will do great disservice to the first amendment and the protection granted thereunder.

II.

THE INDIANA COURT OF APPEALS HAS DECIDED A QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, TO-WIT: *HELLER V. NEW YORK*, 413 U.S. 483 (1973), SPECIFICALLY, THAT ONE CHARGED WITH CRIMINAL RICO VIOLATIONS, BASED UPON PREDICATE OBSCENITY OFFENSES NOT REDUCED TO CONVICTION, IS NOT ENTITLED TO A PROMPT ADVERSARY HEARING ON THE PROBABLE OBSCENITY OF THE MATTER UPON WHICH THE PROSECUTION IS BASED.

Under the Indiana obscenity statute, specifically I.C. 35-49-2-4, individuals charged with violations of the statute are

accorded an opportunity for an adversarial hearing for the purpose of determining probable obscenity of materials. Such hearing is statutorily required within ten (10) days after seizure of the material. This hearing is required by the Constitution. *Heller, v. New York*, 413 U.S. 483 (1973); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964). However, because the defendants herein have been charged under the Indiana RICO Statute, the State has effectively denied them the constitutional protections and due process guarantees that the Constitution requires.

The procedures authorized by the Indiana Supreme Court in *Goldsmith v. 4447 Corporation, supra*, will centralize the power to control the availability of sexually explicit materials in the hands of a prosecutor and the most conservative judge in a particular community. Availability of an ex parte hearing for probable cause has a significant chilling effect in a first amendment context. *Freedman v. Maryland*, 380 U.S. 51 (1965); *Heller, supra*.

This Court has, on several occasions, been confronted with circumstances where a properly instructed trial jury has convicted an individual for distributing obscene matter which this Court later determined was not obscene. (e.g. *Carnal Knowledge, Jenkins v. Georgia, supra.*) If First Amendment protections break down in the context of a trial, clearly this Court must recognize that in the context of an ex parte proceeding, the chances of a much greater distortion are obvious.

III.

(A)

THE INDIANA COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A MANNER CONTRARY TO THE DECISIONS OF THIS COURT, TO-WIT: THAT THE STATUTORY DEFINITION OF THE INDIANA CRIMINAL RICO STATUTE AS APPLIED TO UNPROVED ALLEGATIONS OF OBSCENITY VIOLATIONS IS NOT UNCONSTITUTIONALLY VAGUE IN THE FOLLOWING RESPECT: THE REQUIRED SCIENTER.

Petitioners contend that the RICO Statute as applied to the Indiana obscenity statute, I.C. 35-45-6-2, et seq., is constitutionally deficient for the lack of the required element of scienter.

The Petitioners are charged with violating I.C. 35-45-6-2(a)(3), which provides in relevant part that a person commits the offense of "corrupt business influence":

> "who is employed by or associated with an enterprise, and who knowingly or *intentionally conducts or otherwise participates* in the activities of that enterprise through a pattern of racketeering activity . . ." (Emphasis added.)

I.C. 35-45-6-2(a)(3) requires only that a person "knowingly or intentionally" act in violation of the statute. Similarly, I.C. 35-49-3-1, the statutory basis for the predicate acts, only requires that a person "knowingly or intentionally" act in violation of the statute. On its face, therefore, these provisions fail to require scienter absolutely. A person, pursuant to these statutes, may be charged for associating intentionally but not with knowledge, and thus this statute may be applied contrary to this Court's pronouncements in *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974).

The critical importance of the scienter requirement in freedom of speech cases was first enunciated by the Court in *Smith v. California*. The Court said:

> *"By dispensing with any requirement of knowledge of contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter.* For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. It has been well observed of a statute construed as dispensing with any requirement of scienter that: 'Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience.' [citations omitted]. And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. *The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.* Through it, the distribution of all books, both obscene and not obscene, would be impeded." (Footnotes omitted and emphasis added.) *Smith v. California*, 361 U.S. at 153-154.

Inherent vagueness and ambiguities exist in RICO Statute I.C. 35-45-6-2, principally sub-section (a) (3) therein. The ambiguities are apparent. The statute may be fairly interpreted to read that one is subject to these provisions for "knowing or intentional conduct" or for "knowingly or intentionally" otherwise participating. Alternatively, the statute may be interpreted to read that one is subject to these provisions who "knowingly or intentionally conducts" the proscribed activities

or if such person "otherwise participates" in the proscribed activities. For example, may a landlord be liable for knowingly leasing space to a video store that openly rents sexually explicit materials to the adult public? Does a power company intentionally providing electric service thereby participate in the activities of the enterprise and subject itself to criminal liability? Being subject to these interpretations, I.C. 35-45-6-2 (a)(3) is impermissibly vague and violative of the United States Constitution, as persons of common intelligence must necessarily guess as to the meaning of this provision. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Coates v. Cincinnati*, 402 U.S. 611 (1971).

(B)

THE INDIANA COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A MANNER CONTRARY TO THE DECISIONS OF THIS COURT, TO-WIT: THAT THE STATUTORY DEFINITION OF THE INDIANA CRIMINAL RICO STATUTE AS APPLIED TO UNPROVEN ALLEGATIONS OF OBSCENITY VIOLATIONS IS NOT UNCONSTITUTIONALLY VAGUE IN THE FOLLOWING RESPECT: THE DEFINITION OF "PARTICIPATION IN."

Several Justices of this Court have recognized that the definition of obscenity announced in *Miller v. California*, 413 U.S. 15 (1973) contains within it several intentionally vague elements. *Pope v. Illinois*, _____ U.S. _____, 107 S.Ct. 1918 (1987). Practical experience tells us that it is, in the context of a trial, often difficult to measure "contemporary community standards," or to determine what "appeals to a prurient interest."

In the context of obscenity, the Indiana RICO Statute adds another layer of vague definitions, increases the penalties, and imposes severe sanctions in the form of forfeiture and padlocking.

The RICO statute defines a pattern of racketeering activity as:

> "at least two incidents of racketeering activity of predicate offenses that have the same or similar intent, result, accomplice, victim, or method of commission *or* that are otherwise related by distinguishing characteristics that are not isolated incidents."

As a practical matter, every store, from corner drug or video to adult bookstore, which sells any form of sexually explicit materials, risks prosecution under this statute. Each time a drugstore sells *Penthouse*, it risks being labeled a racketeer if a local prosecutor thinks that he can, ex parte, convince a Judge there is probable cause to believe the material is obscene. Each time a video store rents a sexually explicit movie to a customer, it arguably commits a predicate offense. Each sale is similar in that the intent is the same; profit. The result is the same; a customer has left with an item he or she wanted. The method of commission is the same; the item was taken from the shelf and given to the customer for money. Thus, any two sales of sexually explicit material within 5 years risk raising the local video store, drugstore, or adult bookstore to the level of a "racketeering activity."

The RICO statute thus makes criminal the "employment or association" with a completely lawful business. The statute's concept of "participation in" is such that one who is employed by a lawful business may, based upon apparently lawful acts, rise to the level of a racketeer.

The constitutional requirement of precision and clarity proceeds from the concept that an individual ought to be adequately warned that sanctions will attach to future conduct he might be contemplating, and that such warning may not issue in a form that persons of common intelligence must necessarily guess as to its meaning and differ as to its application. *Papachristou v. City of Jacksonville*, *supra*; *Coates v. Cincinnati*, supra. See also, *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926); *Winters v. New York*, 333 U.S. 507 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Simply stated, a criminal statute is vague when it fails to inform persons of ordinary intelligence what their conduct must be in order to avoid violating the law.

Stricter standards of precision are required where a regulation is capable of reaching expression protected by the First Amendment. As stated in *Smith v. Goguen*, 415 U.S. 566 (1974), at 572-573:

> ". . . The due process doctrine of vagueness . . . incorporates notions of fair notice of warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' Where a statute's literal scope, unaided by a narrowing state court interpretation is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts . . ."

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972) at 108-9, this Court stated:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to streer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

CONCLUSION

For all the foregoing reasons, Petitioners request that a Writ of Certiorari issue to the Indiana Court of Appeals, First Division.

Respectfully submitted,

Richard Kammen
McCLURE, McCLURE, & KAMMEN
235 N. Delaware Street
Indianapolis, Indiana 46204
(317) 632-6341

Appendix

APPENDIX A

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

STATE OF INDIANA,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No. 34A02-8603-CR-74
	)	
RONALD W. SAPPENFIELD,	)	
CONNIE SAPPENFIELD,	)	
FANTASY ONE, INC. and	)	
FANTASY TWO, INC.,	)	
	)	
Defendants-Appellees.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
DIVISION I
The Honorable Dennis H. Parry, Judge
Cause No. 2630

RATLIFF, C.J.

STATEMENT OF THE CASE

The State of Indiana appeals the dismissal of two informations charging the Sappenfields with violation of Indiana Code section 35-45-6-2, Indiana's RICO statute. We reverse

FACTS

As a a result of an investigation into adult bookstores in Howard County, law enforcement officers purchased several magazines at two stores allegedly owned or operated by Ronald

and Connie Sappenfield. The magazines contained graphic photographs of heterosexual and homosexual activity. The Sappenfields were charged with violating Indiana's obscenity statute, Indiana Code section 35-49-1-1 *et seq*. Several Howard County residents examined the magazines and gave verified statements to the effect that the magazines were obscene. The Sappenfields have not been tried or convicted on any of the six allegations of distributing obscene matter. The prosecuting attorney also alleged a pattern of criminal activity arising out of the distribution of the same obscene matter pursuant to the Indiana Corrupt Business Influence statute (RICO), Indiana Code section 35-45-6-2.

On June 4, 1985, the Sappenfields moved to dismiss the two counts based on Indiana's RICO statute arguing RICO was unconstitutionally vague and violative of the 14th Amendment. On September 18, 1985, the trial court found that RICO could not be constitutionally applied to violations of Indiana's obscenity statute. Thereafter, the state perfected this appeal.

ISSUE

Whether the trial court erred in granting the Sappenfields' motion to dismiss in ruling that Indiana's RICO statute, I.C. §35-45-6-2, as it applies to a violation of Indiana's obscenity statute, I.C. §35-49-1-1 *et seq*., is unconstitutionally vague and violative of the Due Process Clause of the Fourteenth Amendment.

DISCUSSION AND DECISION

The Indiana RICO statute, as enacted by the legislature in 1980, is essentially patterned after the federal anti-racketeering laws. *See Alvers v. State* (1986), Ind. App., 489 N.E.2d 83, *trans. denied;* 18 U.S.C.A. sections 1961-1986 (West 1984). Indiana Code section 35-45-6-2(a) states:

> "A person:
>
> (1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of

racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an interprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Class C felony."

"'Racketeering activity' means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation" of any of several enumerated predicate offenses, including violation of the obscenity statute. Indiana Code section 35-45-6-1. A "pattern of racketeering activity" means "engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission. . . ." I.C. §35-45-6-1. The purpose of the federal RICO statute, after which the Indiana statute is patterned, is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States* (1983), 464 U.S. 16, 26, 104 S. Ct. 296, 302, 78 L. Ed. 2d 17, 26.

Recently, in a factually similar case, the Indiana Supreme Court addressed the very issue before us today:

> "Before addressing the questions certified for interlocutory appeal, we must analyze the issue found by the Court of Appeals to be dispositive, namely whether the RICO/CRRA statutory scheme as it pertains to the predicate offense of obscenity violates the First and Fourteenth Amendments to the United States Constitution. That analysis begins with the proposition that an act of the legislature must be afforded a presumption of constitutionality. *Ruge v. Kovach* (1984), Ind., 467 N.E.2d 673; *Johnson v. St. Vincent Hospital, Inc.* (1980), 273 Ind. 374, 404 N.E.2d 585."

4447 Corp. v. Goldsmith (filed March 2, 1987), Ind. No. 29S04-8703-CV-270, slip op. at 7.

> "Both the federal and Indiana RICO statutes delineate predicate offenses which underlie an allegation of a pattern of racketeering activity. The Indiana RICO statute as originally enacted included obscenity violations as a predicate offense. While the federal RICO statute did not initially contain the predicate offense of obscenity violations, in 1984 Congress amended the statute to include as a predicate offense 'any act . . . involving . . . dealing in obscene matter . . . which is chargeable under State law and punishable by imprisonment for more than one year.' 18 U.S.C.A. §1961(1)(A) (West Supp. 1986). The statute was further amended to include 'any act which is indictable under . . . title 18, United States Code . . . sections 1461-1465 (relating to obscene matter).' 18 U.S.C.A. §1961(1)(B) (West Supp. 1986).
>
> "Given the clear legislative purpose in enacting these anti-racketeering statutes, that purpose, in the context of alleged obscenity violations, cannot be specifically construed to represent an attempt to restrain the sale or distribution of expressive materials. The legislative attack on racketeering activity is not, as appellants contend, merely a semantic device intended to circumvent well-established First Amendment doctrine.
>
> "Obscenity does not come within the area of constitutionally protected speech or press. *Miller v. California* (1973), 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419; *Roth v. United States* (1957), 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. Our legislature, as has Congress, has determined that obscenity violations should be one of the underlying offenses which may constitute racketeering activity as defined in the RICO statute. We must take heed of that legislative intent.
>
> "We believe the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated predicate offenses which have no conceivable First Amendment ramifications."

4447 Corp., slip op. at 9-10.

> "We hold that the RICO/CRRA statutes as they pertain to the predicate offense of obscenity do not violate the First and Fourteenth Amendments of the United States Constitution."

Id. at 12. The Supreme Court went on to determine that prior convictions for the underlying offenses are not required to prove a pattern of racketeering activity under I.C. §35-45-6-2.

In light of this recent supreme court decision, the State's position is clearly correct. Indiana's RICO statute is not unconstitutional as applied to the State's obscenity statute. Therefore, the trial court erred in granting the Sappenfields' motion to dismiss regarding the counts based on the RICO statute.

We therefore reverse the judgment and remand for proceedings consistent with this opinion.

ROBERTSON, J. and NEAL, J., concur.

APPENDIX B

STATE OF INDIANA -V- SAPPENFIELD, RONALD & CONNIE

You are hereby notified that the COURT OF APPEALS has on this day 5/15/87 APPELLEE'S PETITION FOR REHEARING DENIED. GEORGE B. HOFFMAN, JR., ACTING CHIEF JUDGE.

WITNESS my name and the seal of said Court, this 15th day of MAY, 1987.

/S/ Daniel Heiser

Clerk Supreme Court, Court of Appeals and Tax Court

APPENDIX C

STATE OF INDIANA -V- SAPPENFIELD, RONALD & CONNIE

You are hereby notified that the COURT OF APPEALS has on this day 8/17/87 APPELLEE'S PETITION TO TRANSFER IS HEREBY DENIED, WITHOUT OPINION. SHEPARD, C.J. DEBRULER, J. VOTES TO GRANT.

WITNESS my name and the seal of said Court, this 17th day of AUGUST, 1987.

/S/ Daniel Heiser

Clerk Supreme Court, Court of Appeals and Tax Court

APPENDIX D

35-45-6-1 Definitions

Sec. 1. As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1; a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a Class C felony (IC 35-42-2-1), kidnapping (IC 35-42-3-2); child exploitation (IC 35-42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); official misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tampering (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gambling

(IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10). *As added by Acts 1980, P.L.199, SEC.2. Amended by P.L.190-1984, SEC.1.*

35-45-6-2 Corrupt business influence

Sec. 2. (a) A person:

(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits corrupt business influence, a Class C felony. *As added by Acts 1980, P.L.199, SEC.2.*

35-49-2-4 Adversary hearing; application for; preliminary determination

Sec. 4. (a) Within ten (10) days after:

(1) matter is obtained by seizure or by purchase under this article; or

(2) the defendant is arrested under this article;

whichever is later, and before trial, the state, the defendant, an owner, or any other party in interest of any matter seized or purchased may apply for and obtain a prompt adversary hearing for the purpose described in subsection (b).

(b) At the adversary hearing, the court shall make a preliminary determination of whether the matter is:

(1) probably obscene; or

(2) probably harmful to minors.

As added by P.L.311-1983, SEC.33.

Chapter 30.5. Civil Remedies for Racketeering Activity.

34-4-30.5-1 Definitions

Sec. 1. As used in this chapter:

"Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) is the object of corrupt business influence (IC 35-45-6-2); or

(2) has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1. *As amended by P.L.308-1985, SEC.1.*

34-4-30.5-2 Injunctive relief from corrupt business influence; action by prosecuting attorney

Sec. 2. The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) order a defendant to divest himself of any interest in any enterprise or real property;

(2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) order the dissolution or reorganization of any enterprise;

(4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons. *As added by Acts 1980, P.L.199, SEC.1.*

34-4-30.5-3 Action for forfeiture of property incident to corrupt business influence; orders for forfeiture and seizure

Sec. 3. (a) The prosecuting atorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred. *As added by Acts 1980, P.L.199, SEC.1*

34-4-30.5-4 Seizure of property subject to forfeiture; requisites; custody; limitation of actions

Sec. 4. (a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) the seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter;

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) place the property under seal;

(2) remove the property to a place designated by the court; or

(3) require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to repleven,[1] but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 of this chapter. If an action is not filed within 180 days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner. *As added by Acts 1980, P.L.199, SEC.1.*

34-4-30.5-5 Injunctive relief and damages from corrupt business influence; actions by aggrieved persons; jury trial; right to forfeited property

Sec. 5. (a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

34-4-30.5-5 Injunctive relief and damages from corrupt business influence; actions by aggrieved persons; jury trial; right to forfeited property; state as aggrieved person

Sec. 5. (a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may

order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violation of IC 35-45-6-2 to pay to the aggrieved person:

(1) an amount equal to three (3) times his actual damages;

(2) the costs of the action;

(3) a reasonable attorney's fee; and

(4) any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section. *As amended by P.L.308-1985, SEC.2.*

34-4-30.5-6 Collateral estoppel; criminal proceeding

Sec. 6. In any action brought under this chapter, the prin-

ciple of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2. *As added by Acts 1980, P.L.199, SEC.1.*

APPENDIX E

IN THE HOWARD SUPERIOR COURT
DIVISION 1

STATE OF INDIANA)
) SS
COUNTY OF HOWARD)

STATE OF INDIANA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 2630
	)	
RONALD W. SAPPENFIELD,	)	
CONNIE SAPPENFIELD,	)	
FANTASY ONE, INC. and	)	
FANTASY TWO, INC.,	)	
	)	
Defendants.	)	

MOTION TO DISMISS

Comes now the defendant, by counsel, and moves the court to dismiss Counts IV and VIII of the information herein for each of the following reasons:

1. The statute upon which the information is based is unconstitutional, as applied in this case, in that said statute, as applied, violates the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America.

9. The law, as applied, is unconstitutional, in that the defendant was never accorded an opportunity for a prompt hearing on probable obscenity either prior to, or subsequent to, the seizure of the materials, as guaranteed by the Fifth and

Fourteenth Amendments to the Constitution of the United States of America.

Respectfully submitted,

/S/ Richard Kammen

McCLURE, McCLURE & KAMMEN
235 North Delaware
Indianapolis, Indiana 46204
Telephone: (317) 632-6341

Counsel for Defendant

MEMORANDUM OF LAW

Specifications 1, 2, and 8 of the Defendant's Motion to Dismiss are based upon the failure of the State of Indiana, in both the drafting of the criminal statute under which the defendant stands charged and the application of this statute, to follow the requirements of the First Amendment to the Constitution of the United States of America, and Article I, Sections 3, 4, 9, 12, 13, 14, 16, 17, 21, 23, and 31 of the Constitution of the State of Indiana.

Several things are clear. All printed matter, all movies, and all publications of any sort are clothed with the presumption that they are legitimate and protected by the First Amendment to the Constitution of the United States of America. *Doran v. Salem Inn*, 422 U.S. 922; *Salem Inn, Inc. v. Frank*, 522 F.2d 1045; *Southeastern Promotions Limited v. Conrad*, 420 U.S. 546 (1975); *Lee Art Theatre v. Virginia*, 392 U.S. 636; *Interstate Circuit, Inc., v. City of Dallas*, 390 U.S. 676; *Jacobellis v. Ohio*, 378 U.S. 184; *Joseph Burstein, Inc. v. Wilson*, 343 U.S. 495; *Roaden v. Kentucky*, 413 U.S. 57; *Bantum Books v. Sullivan*, 372 U.S. 58; *Quantity of Books v. Kansas*, 378 U.S. 205. Even if an individual is arrested and charged with distribution of obscene matter, the matter is still cloaked with the presumption that it is protected, and remains so cloaked unless and until the individual charged is in fact convicted. *Heller v.*

New York, 413 U.S. 483. See also *United States v. Thirty-seven Photographs*, 402 U.S. 363; *Freedman v. Maryland*, 380 U.S. 51 (1965). In *Freedman*, the United States Supreme Court said:

> "Because only a judicial determination in an adversary proceeding insures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 402 U.S. at 367. See also *Bount v. Rizzi*, 400 U.S. 410, *Tittel Film Corp. v. Kusek*, 390 U.S. 139.

A judgment that material is in fact obscene does not taint similar items. A judgment that material is obscene taints only that particular item. *Quantity of Books v. Kansas*, 378 U.S. 205; *Bantum Books v. Sullivan*, 83 S.Ct. 639; *Organization for a Better Austin v. Keefe*, 402 U.S. 415; *Carol v. President and Commissioner of Princess Anne County*, 393 U.S. 175.

Similarly, businesses which are convicted of selling obscene material may not be closed, nor may a permit or license be revoked or denied. *Universal Amusement Company v. Vance*, 100 S.Ct. 1156 (1980), 587 F.2d 159; *People ex rel. Busch v. Projection Room Theatre*, 550 P.2d 600 (1976); *General Corp. v. Sweeten*, 320 South 2d 668 (Alabama, 1975); *Kansas v. Motion Picture Entitled "The Bet"*, 219 Kansas 63 (1976); *Gulf States Theatres of Louisiana v. Richardson*, 287 S.2d 480 (Louisiana, 1974); *New Riviera Arts Theatre v. Davis*, 219 Tennessee 652 (1967); *Society to Oppose Pornography, Inc. v. Thevis*, 255 S.2d 876; *Giarrusso v. D'Iberville Gallery*, 295 S.2d 891; *State ex rel. Blee v. Mohney Enterprises*, 289 N.E.2d 519 (Ind. App. 1973); *Sanders v. State*, 203 S.E.2d 152 (1974); *State ex rel. Field v. Hess*, 540 P2d; *Commonwealth ex rel. Davis v. Van Emberg*, 347 Atl.2d 712; *City of Minot v. Central Avenue News, Inc.*, 308 N.W.2d 851; *Parish of Jefferson v. Bayou Landing Limited, Inc.* 305 S.2d 158 (1977); *Nihiser v. Sendak*, 405 F.Supp. 1124; *Yuclan Enterprises, Inc. v. Arre*, 488 F.Supp. 820; *Avon Forty-Second St. Corp. v. Meyerson*, 352 F.Supp. 994; *Oregon Book Mark Corp. v. Shrunk*, 321 F.Supp. 639; *City of Seattle v. Bitner*, 505 P.2d 126.

Finally, because of its paramount place in the constellation of constitutionally protected freedoms, statutes which touch upon the exercise of First Amendment rights are carefully scrutinized, and if, on examination, they hinder the execise of First Amendment rights, they are unconstitutional, both under Federal and State Constitutions. *State v. Kubel*, 172 N.E.2d 45.

State v. Kubel, *supra.*, provides an interesting analysis. In that case, the Indiana Supreme Court said:

> "Article I, Section 9, of the Constitution of Indiana provides 'no law shall be passed restraining the right to speak, write, or print freely, on any subject whatsoever; but for the abuse of that right every person shall be responsible.'
>
> The State may, in the proper exercise of the police power, prevent the sale and distribution of obscene matter, but when this is attempted in a manner which tends to restrict the right of free speech or expression, then the right of free speech guaranteed by Article I, Section 9, must be weighed in the balance against the requirement of the public safety and welfare which are asserted by the restriction sought.
>
> When this test is applied to the situation with which we are now confronted, the scales weigh in favor of the right to free speech and free expression.
>
> The imposition of a strict liability by the statute here has the effect of restricting the free interchange of thought and opinion by requiring a bookseller to act at his peril in the sale and distribution of books and periodicals, whether obscene or not obscene. Under such circumstances, the bookseller will restrict and limit the books and periodicals entirely free of any possibility of contaminating matter, which might cause his summary arrest merely for having such items in his store. This type of censorship would result in preventing the sale and distribution of many books and periodicals which a court might finally determine not to be obscene, thereby imposing a censorship exceeding the boundaries which are pre-

scribed by the limits beyond which the police power cannot operate."

When analyzed under the foregoing principles, it is very obvious that, as applied to businesses selling materials protected by the First Amendment, the corrupt business practices act is unconstitutional and violative of the First Amendment of the Constitution of the United States, and Article I, Section 9 of the Constitution of the State of Indiana in several different respects.

It is clear that, absent a conviction for distribution of obscene matter, the statute in question is patently unconstitutional.

Moreoever, the statute is unconstitutional when applied to First Amendment related businesses, because it provides none of the required protections guaranteed by the First Amendment to the Constitution of the United States of America.

Because printed and pictorial matter is protected, one who sells such matter has the freedom to probe the outer limits of that which the community will tolerate. *Heller v. New York*, *supra.*, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Jenkins v. Georgia*, 418 U.S. 153 (1974). The First Amendment allows the individual to challenge the thinking and the feelings of the community. *Memoirs v. Massachusetts*, *supra*.

Consequently, before an individual may be brought to trial as a result of an allegation that material which he has sold violates the First Amendment, he must be accorded an opportunity to show the judge that the material is within the ambit of the First Amendment. This is required by statute. IC 35-30-10.1-1, *et seq*. See also *Heller v. New York*, *supra; Quantity of Books v. Kansas*, *supra.; Marcus v. Search Warrant*, *supra*. Because petitioner has never been accorded such an opportunity, and could not be accorded such an opportunity under this particular statute, the statute, as applied and as written, is unconstitutional as applied to a First Amendment business.

Additionally, because the defendant has not been convicted of distribution of obscene matter, he submits that he cannot be constitutionally charged with racketeering. To allow this pros-

ecution to continue will have a substantial "chilling effect" upon the exercise of First Amendment rights. Perhaps, necessarily, the statute defining obscenity is couched in vague terms. Individual standards may vary from area to area. IC 35-30-10.1-1, *et seq.* However, if one, who on two occasions four or five years apart, sells a a particular book or material, or two similar books or materials which, in the eyes of some prosecutors, can subject him a charge of corrupt business influence, then clearly acceptable. The net result will be to reduce that which is available to adults to material only suitable for children. (Prohibited by *Butler v. Michigan*, 352 U.S. 380, 1957). The result will be a substantially "chilling effect" upon the exercise of constitutional liberties throughout the State of Indiana.

IC 35-45-6-2 must be reviewed against this constitutional background. This statute provides:

(a) A person:

(1) who has knowingly or intentionally received any proceeds *directly or indirectly derived* from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise *participates in the activities of that enterprise* through a pattern of racketeering activity;

commits corrupt business influence, a Class C Felony.

Racketeering activity, as defined by IC 35-45-6-1, includes, among other things, violations of any of the securities laws, violations of certain prohibitions against sale of obscene materials, promoting prostitution, promoting professional gambling, drug offenses, and the like.

The complexity of IC 35-45-6-2 is readily apparent. When the individual components of this statute are analyzed, its unconstitutionality as a whole is readily apparent.

Where there is ambiguity in a criminal statute, all doubts are resolved in favor of the defendant. *U.S. v. Bass* (1971), 404 U.S. 336.

Of primary import is the question of the required scienter. The statute appears to prohibit the doing or intentional receipt of proceeds, either directly or indirectly derived from a pattern of racketeering activity. The statute does not require, however, that the individual receiving those proceeds be "a member" of the racketeering organization. Thus, one who sells eggs to a restaurant known to be controlled by a racketeering activity, might render himself liable under this statute. This is especially so if, having saved the profits from the egg business, he buys a home or continues to operate his completely legal sole proprietorship. Similarly, one rendering unquestionably permissible services to a business accused of racketeering might find himself caught up under this statute.

Because men of ordinary intelligence could not see, at the time they do certain acts, that they might be violating the law, the statute is unconstitutional. Similarly, the clerk at a liquor store, who happens to unknowingly deliver to a state legislator a bribe, is employed or associated with an enterprise and does knowingly or intentionally participate in the activities of that enterprise through a pattern of racketeering activity, even though he may have been unaware of what he was doing.

Clearly, as written, the scienter element under IC 35-45-6-2, is not limited to activity undertaken to facilitate illegal

activities of a racketeering enterprise. This is important. A racketeering enterprise may engage in many activities, some of which are not, in and of themselves, illegal.

Therefore, the defendant submits that the statute fails to specify, with reasonable clarity, specifically what kinds of activity it prohibits and is therefore unconstitutionally vague. It is, of course, fundamental that no one may be required, at peril of life, liberty or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. *Lanzetta v. New Jersey* (1939), 306 U.S. 451.

The defendant has previously alluded to a second problem, which is that there is no requirement that an individual know that his actions are a pattern of racketeering activity. As indicated, a seller, one who is a vendor to an enterprise which happens to be participating in racketeering activities, may be obtaining proceeds indirectly from said activities, and may find himself within the ambet of this statute.

The vague language of the statute thus may subject an individual to criminal sanctions for activities, the legality of which cannot be determined solely by the actor's conduct, but must be determined by factors which a person may be unaware of at the time. Such a statute violates due process. It lacks the ascertainable standards that give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *U.S. v. Harris* (1954), 347 U.S. 612. A second example is perhaps appropriate. As discussed elsewhere in this memorandum, IC 23-2-1, *et seq.*, provides several hundred different acts, the doing of which or the failure to do, might constitute a criminal violation.

One who is a secretary for a business which is systematically violating the technical aspects of IC 23-2-1, is deriving, indirectly, proceeds from a pattern of racketeering activity. Should that individual choose to purchase a home, or perhaps rent an apartment (a lease is an interest in real property), might find themselves subjected to prosecution under this statute. Yet, until their arrest, their conduct would have been so innocent that they would have had no way of knowing, in any manner, that they were violating the law.

Unlike traditional forms of conspiracy, which require active participation, the racketeering statute provides mere employment or "association." Additionally, the statute fails in any manner to distinguish between the principles in the racketeering business and mere employees or associates. As such, the statute is unconstitutionally vague.

Finally, the term "association" does not lend itself to a sufficiently precise definition to be a permissible standard of criminal liability.

Friends are often associates. Clearly a secretary is associated with a business. Clearly a vendor may be associated with a business. All of those may have knowingly received proceeds directly or indirectly derived from a pattern of racketeering activity. Yet, their conduct may have been completely innocent.

Finally, the term "pattern of racketeering activity" is unconstitutionally vague. The statute defines "pattern of racketeering activity" as:

> "at least two incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, method of commission, or that are otherwise interrelated by distinguising characteristics that are not isolated incidents. However, the incidents are a pattern of racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five years after a prior incident of racketeering activity.

When analyzed, it is obvious that this definition is not constitutionally acceptable. For example, does the phrase "two incidents of racketeering activity that have the same or similar intent" mean traditional criminal scienter, such as knowing or wilful, or the intent to accomplish a certain goal, *e.g.*, make money. The same problem exists with the phrase "result, accomplice, victim, or method of commission." What is a similar result? What is a similar accomplice? What is a similar victim?

One who sells a copy of "Hustler" on September 1, 1980, and who, on September 1, 1984, sells a second copy of "Hustler", may have been deemed to have violated IC 35-30-10.1-2 (Distribution of Obscene Matter). Those incidents, while seemingly isolated, are not so isolated as to be outside the prohibition of the racketeering activity. While four years might seem to be isolated apparently in Indiana this is not the case. They would probably have the same or similar intent; i.e., to sell the magazine; the same or similar result, i.e., to derive proceeds from that sale; and the same or similar method of commission, i.e., handing the magazine across a counter to a customer and taking his money. Yet, the clerk who sold these two issues of "Hustler" would in no manner have any reason to think that he was elevated to the status of a senior member of a racketeering organization.

Respectfully submitted,

/S/ Richard Kammen

McClure, McClure & Kammen
235 North Delaware
Indianapolis, Indiana 46204
Telephone: (317) 632-6341

Counsel for Defendant

APPENDIX F

IN THE HOWARD SUPERIOR COURT

1985 TERM

STATE OF INDIANA)
) SS:
COUNTY OF HOWARD)

STATE OF INDIANA

vs.

RONALD W. SAPPENFIELD, CONNIE SAPPENFIELD, FANTASY ONE, INC. AND FANTASY TWO, INC.

CRIMINAL CAUSE NO. 2630

RULING ON MOTION TO DISMISS

The defendants are charged in Counts IV & VIII with violation of Indiana Code 35-45-6-2(3). It reads as follows:

> "a person: (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

commits Corrupt Business Influence, a class C felony."

The defendants are charged with two (2) counts of Racketeering by the sale or distribution of obscene material as defined in Indiana Code 35-30-10.1-2.

"Racketeering activity" is defined as follows:

> ". . . .to commit, to attempt to commit, or to conspire to commit a violation. . . .IC 35-30-10.1-2. . . ."
>
> "Pattern of Racketeering activity means engaging in at least two (2) INCIDENTS (emphasis supplied) of racketeering activity. . . ."

The Constitution of the United States of America, by its First Amendment, offers protection to printed matters, movies and publications by the presumption that they are legitimate.

There must be a judicial determination, in an adversary proceeding, that these items are outside the scope of protection before a valid restraint may be imposed upon this fundamental right.

The defendant argues various points in support of their motion to dismiss and requests of this court a close scrutiny of this statute because of the possible "chilling effect" upon First Amendment rights.

The defendants in this cause have not been convicted of sale or distribution of obscene material. In fact, they have been charged with such an offense simultaneously herewith. The material alleged to have been sold or distributed has yet to be determined to be prohibited or protected. No trial has taken place for a jury to determine the "prevailing community standard".

The Racketeer Influence and Corrupt Organization Statute (R.I.C.O.) allows for the prosecutor to determine that the material violates current standards of the community and that merely purchasing on two (2) occasions fulfils the statutory requirement of "two incidents" of activity.

What constitutes "two incidents of *activity*"? Certainly it must be more than merely distributing or selling written material which has not been determined by a judicial proceeding to be unlawful.

In *Conolly v. General Construction Co.* (1926) 269 U.S. 385, it is stated

> "The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement consonant alike with ordinary notions of fair play and the solid rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Therefore, this Court finds the defendants' argument is well founded and this Court now finds that Indiana Code 35-45-6-2(3), as it applies to a violation of Indiana Code 35-30-10.1-2, is unconstitutionally vague and violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, and therefore grants the defendants' Motion to Dismiss as to Counts IV and VIII.

DATED THIS 18th DAY OF SEPTEMBER, 1985.

/S/ DENNIS H. PARRY

JUDGE, HOWARD SUPERIOR COURT

APPENDIX G

4447 CORPORATION, et al., Appellants,

v.

Stephen GOLDSMITH, Appellee.

FORT WAYNE BOOKS, INC., et al., Appellants,

v.

STATE of Indiana and Stephen M. Sims, Appellees.

No. 29S04-8703-CV-270.

Supreme Court of Indiana

March 2, 1987.

CIVIL PETITION TO TRANSFER

GIVAN, Chief Justice.

These consolidated causes are before the Court on appellees' Petition to Transfer. Appellees filed similar actions in which they allege the various defendants, owners and operators of adult bookstores, have engaged in racketeering activity as defined in the Racketeer Influenced and Corrupt Organizations Act (RICO), Ind. Code § 35-45-6-1 *et seq.* Appellees seek various remedies as provided in the Civil Remedies for Racketeering Activity (CRRA) statute, Ind. Code § 34-4-30.5-1 *et seq.*

In both cases the trial court, pursuant to Ind. Code § 34-4-30.5-3(b), entered an *ex parte* order seizing appellants' assets. On interlocutory appeal of the denial of appellant's motions to vacate the seizure orders, a majority of the Court of Appeals, Fourth District, held that the RICO and CRRA statutes constitute facially unconstitutional prior restraints in their application to the predicate offense of obscenity. *4447 Corp. v. Goldsmith* (1985), Ind.App., 479 N.E.2d 578, 592. We grant appellees' petition and thereby vacate the opinion of the Court of Appeals.

In 1980, the legislature enacted the Indiana RICO statute, which is essentially patterned after the federal anti-racketeering laws. *See Alvers v. State* (1986), Ind. App., 489 N.E.2d 83. As set out in Ind. Code § 35-45-6-2(a), a person:

> "(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;
>
> (2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or
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> (3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;"

commits the offense of Corrupt Business Influence, a Class C felony. " 'Racketeering activity' means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation" of any of a number of enumerated predicate offenses, including violation of the obscenity statute. Ind. Code § 35-45-6-1. A "pattern of racketeering activity" is defined as "engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission. . . ." *Id.*

Under the CRRA provisions, the prosecuting attorney in a county in which the violation occurs may bring an action to enjoin a violation of the RICO statute. Ind. Code § 34-4-30.5-2. If the court finds by a preponderance of the evidence that such a violation has occurred, it may:

> "(1) order a defendant to divest himself of any interest in any enterprise or real property;
>
> (2) impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) order the dissolution or reorganization of any enterprise;

(4) order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) make any other order or judgment that the court considers appropriate." *Id.*

Additionally, pursuant to Ind. Code § 34-4-30.5-3(a), the prosecuting attorney in a county in which any of the property is located "may bring an action for the forfeiture of any property used in the couse of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2." Upon a showing by a preponderance of the evidence that the property in question was so used, the court shall order the property forfeited to the state. *Id.* When a forfeiture action has been filed, the prosecutor may move for an order to have the property subject to forfeiture seized by a law enforcement agency and the court "shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred." Ind. Code § 34-4-30.5-3(b).

The first of the instant cases was commenced on August 1, 1983, when appellee Stephen Goldsmith, Prosecuting Attorney for the Nineteenth Judicial Circuit, filed a CRRA action in Marion Circuit Court. The complaint alleged that the three bookstores owned and operated by the individual and corpo-

rate defendants (appellants) comprised an illegal enterprise as defined in Ind. Code § 35-45-6-1 and that appellants had engaged in a pattern of racketeering activity. The predicate offenses alleged were the distribution of obscene matter in violation of Ind. Code § 35-30-10.1-2 (repealed by Acts 1983, P.L. 311, recodified as Ind. Code § 35-49-3-1).

At the same time Goldsmith filed a Verified Petition for Seizure of Property Subject to Forfeiture. In support of the petition, he attached a probable cause affidavit sworn by Detective Thomas R. Rogers of the Indianapolis Police Department. Detective Rogers stated therein that he and other officers had visited the two operating bookstores alleged to be part of the illegal enterprise, where they observed sexually-oriented books, magazines, films and videotapes available for sale or exhibition. The officers purchased four sexually explicit movies which were submitted to the court.

The officers were informed by one of the bookstore employees that a new bookstore, to be known as the Plaza Entertainment Center, was due to open at 4266 West 38th Street in Indianapolis on August 11, 1983. One of the officers visited that location and spoke to a construction worker, who informed the officer that sexually-oriented materials would be available for sale. In conclusion, Detective Rogers alleged that numerous investigations had led him to the reasonable belief that the two existing adult bookstores were part of a single enterprise and that the enterprise was preparing to open a new bookstore which would sell and exhibit obscene materials.

Based on those representations, the trial court on August 1 found probable cause to believe violations of the RICO statute existed and entered an *ex parte* order compelling the Indianapolis Police Department to seal the unopened bookstore. The court also ordered appellants to preserve certain business equipment located at the two operating bookstores and to list their other property. Trial was set for 72 hours later.

On August 4 appellants filed motions to dismiss the complaint and to vacate the seizure order, based in part on their contention that the order and the RICO statute abridged the

exercise of the freedoms of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution. The cause was continued on appellants' motions and later transferred to Hamilton Circuit Court, where on September 8 Goldsmith filed an amended complaint seeking a number of CRRA remedies.

On December 21, 1983, the trial court denied appellants' motions to dismiss the complaint and to vacate the August 1 seizure order. The court, pursuant to Ind. R. App. P. 4(B)(6), then certified for interlocutory appeal the question of whether a seizure order may issue when based on obscenity violations not yet ligitated.

On March 19, 1984, appellee Stephen Sims, Prosecuting Attorney for the Thirty-Eighth Judicial District, filed a CRRA action in the Allen Circuit Court. The complaint alleged that the three adult bookstores owned and operated by the various defendants (appellants) comprised an illegal enterprise and that appellants had engaged in a pattern of racketeering activity, the predicate offenses being the distribution of obscene materials. Cited in the complaint were appellants' thirty-nine obscenity convictions entered between June of 1981 and March of 1984.

Sims simultaneously filed a Verified Petition for Seizure of Property Subject to Forfeiture. Attached to the petition was a probable cause affidavit sworn by Officer Charles Dennis of the Ft. Wayne Police Department. The affidavit alleged the thirty-nine prior obscenity convictions and related that police officers had observed materials believed to be obscene during recent surveillance of the bookstores. Also submitted to the court were taped descriptions by police officers of the contents of the materials.

That same day the court entered an *ex parte* order allowing the Ft. Wayne Police Department to seize the contents of the three bookstores. On March 23 appellants moved to vacate the order and in the alternative sought a modification of the order which would allow them to continue the sale and distribution of the materials in the bockstores. Those motions were premised

on appellants' allegation that the order constituted a constitutionally impermissible prior restraint. The motions were denied on March 29.

After police officers on April 3 hauled away the contents of the bookstores, appellants filed an Emergency Motion for Inventory of Property Removed and/or Return of Property. That motion was also denied. On April 18 the trial court certified two questions for interlocutory appeal: 1) whether an application for seizure upon probable cause shown *ex parte* as provided by Ind. Code § 34-4-30.5-3(b) violates due process guarantees provided by the Indiana and United States Constitutions; and 2) whether the seizure order, which is based upon prior criminal convictions, is a violation of the First Amendment.

Thus these cases are similar, with several important factual distinctions. In the Marion County case, the predicate obscenity violations were shown by the allegations of the investigating officers, while in the Ft. Wayne case the predicate violations underlying the RICO allegation were shown by proof of prior convictions for violations of the Indiana obscenity statute. The two existing Marion County bookstores were permitted to continue operating pending trial and the unopened store was sealed. The Court of Appeals issued a stay order allowing the store to open. The three bookstores in Ft. Wayne were sealed and the contents were hauled away by the police. Those stores remain closed.

Upon consolidating the two cases, the Court of Appeals determined that its disposition of the interlocutory appeals "require[d] resolution of but a single issue: whether the RICO and CRRA provisions invoked against the defendants abridge the freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution." *4447 Corp., supra* at 583. The court concluded that:

> [T]he challenged RICO/CRRA provisions are unconstitutional on three distinct yet interrelated grounds. First, they operate as a prior restraint which impermissibly impinges upon the dissemination of protected mate-

> rials. Second, these measures fail to comply with the procedural safeguards required even for the suppression of *obscene* materials. Finally, independent of our determination that these statutes operate as an unconstitutional prior restraint, their provisions as they relate to obscenity must fall under the less restrictive means test announced in *United States v. O'Brien* (1968), 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, for the evaluation of allegedly content-neutral state regulation which has an incidental impact upon free expression." *Id* at 585 (original emphasis).

[1] Before addressing the questions certified for interlocutory appeal, we must analyze the issue found by the Court of Appeals to be dispositive, namely whether the RICO/CRRA statutory scheme as it pertains to the predicate offense of obscenity violates the First and Fourteenth Amendments to the United States Constitution. That analysis begins with the proposition that an act of the legislature must be afforded a presumption of constitutionality. *Ruge v. Kovach* (1984), Ind., 467 N.E.2d 673; *Johnson v. St. Vincent Hospital, Inc.* (1980), 273 Ind. 374, 404 N.E.2d 585.

Appellees argue the purpose of the CRRA remedies is not to suppress speech but rather to compel the forfeiture of assets acquired through racketeering activity; therefore, their actions were not undertaken in an effort to enjoin or restrain any future display or distribution of presumptively protected expressive material. Appellees assert that since any personal property, regardless of its nature, which is derived from racketeering activity could possibly be seized, the seizure orders were not entered because appellants' assets were obscene materials but because there was probable cause to believe they were assets subject to forfeiture.

Appellants contend that the statutory scheme must be analyzed in terms of its effect upon the exercise of First Amendment rights, and in so doing the only conclusion that can be reached is that the statutes as applied to the predicate offense of obscenity constitute an impermissible prior restaint.

Appellants would have us adopt the Court of Appeals' view "that for constitutional purposes, these proceedings must be viewed as the functional equivalent of a nuisance or obscenity action," *4447 Corp., supra* at 597, and cite a number of cases involving state actions found to constitute prior restraints. *See, e.g., Entertainment Concepts, Inc., III v. Maciejewski* (7th Cir. 1980), 631 F.2d 497 (license revocation); *Universal Amusement co., Inc. v. Vance* (5th Cir. 1978), 587, F.2d 159 (nuisance abatement), *aff'd* (1980), 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413; *State ex rel. Blee v. Mohney Enterprises* (1972), 154 Ind. App. 244, 289 N.E.2d 519 (injunction).

To appellants, the word "racketeering" as applied in this context is merely a semantic device to allow the state to "expand its arsenal of weapons designed to suppress obscenity" to include license revocation, padlocking, forfeiture of property used to disseminate obscene matter and similar methods which the courts have historically condemned; consequently, the CRRA remedies constitute a restraint on future expression. We cannot agree.

The purpose of the federal RICO statute, after which the Indiana statute was patterned, is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States* (1983), 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17, 26. Its provisions are to be liberally construed to effectuate its remedial purposes. *United States v. Turkette* (1981), 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246. One of the most important of those remedies is the forfeiture of assets acquired through racketeering activity. *Russello, supra.*

Both the federal and Indiana RICO statutes delineate predicate offenses which underlie an allegation of a pattern of racketeering activity. The Indiana RICO statute as originally enacted included obscenity violations as a predicate offense. While the federal RICO statute did not initially contain the predicate offense of obscenity violations, in 1984 Congress amended the statute to include as a predicate offense "any act . . . involving . . . dealing in obscene matter . . . which is

chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C.A. § 1961(1)(A) (West Supp. 1986). The statute was further amended to include "any act which is indictable under . . . title 18, United States Code . . . sections 1461-1465 (relating to obscene matter)." 18 U.S.C.A. § 1961(1)(B) (West Supp. 1986).

Given the clear legislative purpose in enacting these anti-racketeering statutes, that purpose, in the context of alleged obscenity violations, cannot be specifically construed to represent an attempt to restrain the sale or distribution of expressive materials. The legislative attack on racketeering activity is not, as appellants contend, merely a semantic device intended to circumvent well-established First Amendment doctrine.

Obscenity does not come within the area of constitutionally protected speech or press. *Miller v. California* (1973), 413 U.S. 15, 93 S.Ct. 2607, 37 L.E.' 2d 419; *Roth v. United States* (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. Our legislature, as has Congress, has determined that obscenity violations should be one of the underlying offenses which may constitute racketeering activity as defined in the RICO statute. We must take heed of that legislative intent.

We believe the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated predicate offenses which have no conceivable First Amendment ramifications. Thus we cannot agree with either appellants or the Court of Appeals that the purpose of the Indiana RICO/CRRA scheme, as it pertains to the predicate offense of obscenity, is to restrain the sale or distribution of expressive materials. It is irrelevant whether assets acquired through racketeering activity are obscene or not. They are subject to forfeiture if the elements of a pattern of racketeering activity are shown. The other CRRA remedies, such as license revocation, are also available regardless of the nature of the racketeering enterprise.

There is a dearth of caselaw concerning RICO-based forfeiture of expressive materials. Appellees rely primarily on *Western Business Systems, Inc. v. Slaton* (N.D.Ga. 1980), 492 F.Supp. 513, a case in which the plaintiffs sought a preliminary injunction in an attempt to prohibit prospectively RICO prosecutions based on the predicate crime of obscenity. The plaintiffs asserted that "the statute constitutes a prior restraint on First Amendment freedoms by allowing certain presumptively protected materials to be forfeited to the state." *Id.* at 514.

The court denied the motion for a preliminary injunction. After reserving ruling on the defendants' contention that the plaintiffs were not proper parties to bring the suit, *Id.*, the court found that the plaintiffs had not shown any significant infringement of First Amendment rights, were not in substantial need of protection, had shown no threat of irreparable harm from enforcement of the statute and had "shown little likelihood of eventual success on the merits of their constitutional attack on the Georgia RICO Act." *Id.* at 515.

In its opinion the court focused primarily on the plaintiffs' argument that the statute allows for the forfeiture of printed matter on the basis that it is probably obscene. According to the court, their "attempted reading does great violence to the words of the statute." *Id.* at 514.

> "As the court reads the statute, Ga. Code § 26-3403 prohibits the acquisition even of legitimate businesses with the proceeds of racketeering (as defined). Under § 26-3405 all property, of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds, is subject to forfeiture to the state. These chattels might be anything from gardening equipment to cook books, and might also be sexually explicit materials. Forfeiture could apply to any chattel whatever, if it was acquired with the proceeds of racketeering. Thus, if the items seized are books or movie films, the seizure is totally unrelated to their contents. They would be forfeited under the statute not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime.

> "Similarly the law enforcement officer authorized by § 26-3405(d)(2) to seize materials prior to the filing of a complaint, would be seizing them upon probable cause to believe that they were subject to forfeiture and not — as plaintiffs argue — upon his personal judgment that the objects are obscene. We must keep in mind that these objects may be anything. *Id.*

We agree with court's reasoning that the purpose of the forfeiture provisions is totally unrelated to the nature of the assets in question. The overall purpose of the anti-racketeering laws is unequivocal, even where the predicate offense alleged is a violation of the obscenity statute. The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene.

Underlying the Court of Appeals' opinion was its fear that "these civil remedies invite indiscriminate prosecution." *4447 Corp., supra* at 592. Believing the "draconian" RICO/CRRA statutes to be "prone to abuse given the relative ease with which the state may invoke their sanctions," *Id.*, the court posited that "[t]he potency of the prosecutorial weapon and the threat it poses to the legitimate exercise of First Amendment freedoms obviously exceed the bounds of constitutionally permissible regulation." *Id.* at 601-02.

We do not share the Court of Appeals' fears that prosecutors will abuse the CRRA remedies and that allowing the seizure and/or forfeiture of assets such as those at issue here will lead to the breakdown of the protections the First Amendment undeniably affords to various forms of expression. It cannot be presumed that prosecutorial discretion will be abused to the extent of threatening "the continued existence of bookstores and theaters." *See Id.* at 601. The remedies provided in the CRRA are a legitimate tool in the attack on racketeering activity. To find otherwise would thwart the legislative intent apparent in the inclusion of obscenity as a predicate offense for

a showing of a pattern of racketeering activity and would allow those engaged in racketeering activity to effectively shield their proceeds so gained behind a psuedo-constitutional barrier.

In sum, these actions seeking various CRRA remedies were instituted in an attempt to compel the forfeiture of the proceeds of alleged racketeering activity and not to restrain the future distribution of expressive materials. We hold that the RICO/CRRA statutes as they pertain to the predicate offense of obscenity do not violate the First and Fourteenth Amendments of the United States Constitution.

[2] We now address the issues certified by the respective trial courts for interlocutory appeal. In the Marion County case, the issue is whether a seizure order could be based on alleged obscenity violations not yet litigated.

There are no reported Indiana cases directly confronting the question of whether prior convictions for the predicate offenses are necessary to sustain a conviction for Corrupt Business Influence under Ind. Code § 35-45-6-2. In *Alvers*, *supra* at 85, the Court of Appeals stated in its recitation of the facts that the defendant "was charged with seven specific acts of two basic types — receiving stolen property and substituted cubic zirconias for diamonds in jewelry that was submitted for repairs, thereby evidencing a pattern of racketeering activity." While it can be implied that there were no convictions for the acts underlying the allegation of racketeering activity, the issue of whether those acts could provide in part the basis for the conviction was not raised on appeal.

Under the federal RICO statute, convictions for the predicate offenses are not required. *Sedima, S.P.R.L. v. Imrex Co.* (1985), 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346; *United States v. Malatesta* (5th Cir. 1978), 583 F.2d 748 *cert. denied* (1979), 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59. Nowhere in Ind. Code § 35-45-6-1, which defines "racketeering activity" and "pattern of racketeering activity," is there reference to the word conviction. *See Sedima*, *supra*. The statute speaks only of committing a "violation" of any of the enumerated predicate offenses.

Had the legislature intended to require convictions for the predicate offenses, it would have so worded the statute. Consequently, we hold that prior convictions for the underlying offenses are not required to prove a pattern of racketeering activity under Ind. Code. § 35-45-6-2.

Appellants make light of the construction of the Indiana RICO statute advanced by the office of the Indiana Attorney General in *J.N.S., Inc. v. State of Indiana* (7th Cir. 1983), 712 F.2d 303, in which the court affirmed the dismissal on standing grounds of the plaintiffs' complaint seeking a declaratory judgment regarding the constitutionality of the Indiana RICO statute as applied to obscenity. As stated by the court, "[w]hile our research discloses no Indiana cases construing the requirement of two 'violations,' at oral argument, a deputy attorney general opined that J.N.S. would have to accumulate two obscenity *convictions* before the state RICO statutes would apply." *Id.* at 306 (original emphasis). That opinion is not binding on this Court, and in any event there is no basis from which to conclude it is a proper construction of the Indiana RICO statute.

The Marion Circuit Court entered its *ex parte* seizure order upon a showing of probable cause to believe a violation of the RICO statute involving the property in question had occurred. As we construe the RICO statute, a showing of prior convictions for the alleged obscenity violations was not required. In order to prevail in the forfeiture action, appellee Goldsmith will of course have to show the existence of the obscenity violations in order to prove a violation of Ind. Code § 35-45-6-2 has occurred. It is at trial on the forfeiture and other requested CRRA remedies that the question of whether the materials are obscene will be litigated. A final determination of that question was not necessary at the hearing on the petition for seizure.

[3] The trial court in the Ft. Wayne case certified two questions: 1) whether the application for seizure violates due process; and 2) whether the order constitutes a violation of the First Amendment. As to the latter question, we have above held that the RICO/CRRA statutory scheme as applied to the

predicate offense of obscenity does not violate the First and Fourteenth Amendments. We accordingly find the seizure order does not constitute a prior restraint or in any other manner impinge upon appellants' rights under those amendments.

Concerning the former question, which was not addressed by the Court of Appeals in the majority opinion, we interpret the trial court's inquiry to be whether, in light of procedural due process guarantees, the appellants can be deprived of their property, without an adversary hearing, pending trial on the forfeiture action. Ind. Code § 34-4-30.5-3(b) clearly allows, upon the filing of a forfeiture action under Ind. Code § 34-4-30.5-3(a), for the entry of an order seizing property allegedly subject to forfeiture upon a showing of probable cause to believe a violation of the RICO statute involving the property in question has occurred.

The Marion Circuit Court, although not required to do so by Ind. Code § 34-4-30.5-3, *sua sponte* set trial for 72 hours after the entry of its seizure order. The Allen Circuit Court did not set a trial date after entering the *ex parte* seizure order; nevertheless, we find that the setting of a trial date within such a brief period is not required to guarantee the due process rights of appellants.

At the point a seizure order is entered there has been a judicial determination that there is probable cause to believe a violation of Ind. Code § 35-45-6-2 involving the property has occurred. The reason for an adversary hearing on the seizure of the property would be to determine whether the property had been unlawfully seized. Generally, a defendant would initiate such action by the filing of a motion to vacate the seizure order, as was done in the instant cases, and we would expect the court to hold a prompt adversarial hearing on such a motion. If no motion to vacate is filed, or if the motion is denied, there will be a full adversarial hearing on the merits of the forfeiture action. Although Ind. Code § 34-4-30.5-3(a) does not specifically provide a time frame for that hearing, we would interpret the statute to require the hearing on the question of forfeiture to be held within a reasonable time.

Thus a defendant whose property has been seized pursuant to Ind. Code § 34-4-30.5-3(b) is afforded due process by a prompt adversarial hearing on a motion to vacate the seizure order and/or by a hearing on the question of forfeiture held within a reasonable time after the CRRA complaint and petition for seizure have been filed. In the instant case, appellants were afforded a hearing on their motions to dismiss the complaints and to vacate the seizure orders. Because the proceedings were halted by the filing of the interlocutory appeals, there has been no opportunity for trials on the merits of the CRRA complaints. At this stage we can discern no violation of appellants' due process rights.

Transfer is granted and the opinion of the Court of Appeals is vacated. The causes are remanded for further proceedings not inconsistent with this opinion.